## ARGUMENT

### I. THERE ARE NO COMPELLING REASONS TO GRANT CERTIORARI

Petitioner has not asserted that the Court of Appeals affirmance conflicts with any court of appeals decisions from other circuits. Further, because Petitioner's claim is based on interpretation of federal statute and rules, no state court authority is at issue. Nor does this Petition raise any constitutional or significant issues meriting the attention of this Court.

Thus, Petitioner offers no basis for this Court to grant the instant Petition for a Writ of Certiorari.

### II. THE DISTRICT COURT AND THE COURT OF APPEALS ADHERED TO THIS COURT'S ESTABLISHED PRINCIPLES IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Summary judgment will be upheld if the record establishes that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise sufficiently supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986). And, the adverse party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

No special rules apply to summary judgment motions in employment discrimination cases and the "impression that summary judgment is unavailable in discrimination cases is unsupportable." *Weinstock v. Columbia Univ.*, 224 F.3d 33, 41, 49 (2d Cir. 2000), *cert. denied*, 540 U.S. 811 (2003).

Further, in determining if there is a material issue to be tried, courts must "carefully distinguish between evidence that allows for a reasonable inference of discrimination and evidence that gives rise to mere speculation and conjecture." *Bickerstaff v. Vassar College*, 196 F.3d 435, 448 (2d Cir. 1999), *cert. denied*, 530 U.S. 1242 (2000). "Statements that are devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment." *Id.* at 452. Thus, to survive summary judgment, a plaintiff "must come forward with at least some credible evidence that the actions of the [defendants] were motivated by [. . .] animus or ill-will." *Grillo v. New York City Transit Auth.*, 291 F.3d 231, 234 (2d Cir. 2002).

As set forth below, the record in this case conclusively demonstrates that the District Court's decision to dismiss Petitioner's Title VII race discrimination claim and the Court of Appeals decision to affirm such dismissal were both factually and legally correct and do not raise any issues worthy of consideration by this Court.

## III. SUMMARY JUDGMENT DISMISSING PETITIONER'S RACE DISCRIMINATION CLAIM WAS APPROPRIATE

The lower courts rightly found that the evidentiary record in this case: (1) did not support a *prima facie* case of race discrimination with respect to the assignment of overtime or the amount of overtime Petitioner received; and (2) that Petitioner could not point to any evidence rebutting Respondent's legitimate, nondiscriminatory reason for the manner in which overtime is assigned and the number of overtime hours he received.

### A. Petitioner Cannot Prove A *Prima Facie* Case Of Race Discrimination And, Thus, Summary Judgment Was Proper

The District Court found – based on the undisputed evidence in the record – that "[w]hile denial of overtime assignments may be an adverse employment action, such is not the case here. [Petitioner] has not suffered any adverse employment action because his overtime hours compare favorably with the average number of overtime hours worked by his Hispanic and Caucasian counterparts." (Pet. App. B at 17a). And, as the Court of Appeals found, Petitioner offered no admissible evidence that he worked less overtime hours than the average number of overtime hours worked by his Hispanic and Caucasian co-workers. Thus, "it was proper for the district court to rely on [Respondent's] figures." (Pet. App. A at 3a).[1]

[1] Given the District Court's well-supported finding that Petitioner's overtime hours compared favorably with those worked by his Hispanic and Caucasian co-workers and thus, he did not suffer (Cont'd)

Further, the undisputed record before the District Court – including Petitioner's own admissions – establishes that Petitioner "was offered the opportunity to work additional . . . overtime . . . and declined." (Pet. App. B at 17a). Thus, the District Court properly concluded that not only did Petitioner work more than his fair share of overtime – thus precluding the establishment of a *prima facie* case – but that Petitioner cannot support a claim of discrimination based on missed overtime opportunities when "he removed himself from receiving additional overtime hours by refusing those 'off-list' opportunities offered to him." (Pet. App. B at 18a).

### B. Petitioner Did Not Offer Any Evidence Of Circumstances Giving Rise To An Inference Of Discrimination

In addition to his failure to show that he suffered an adverse employment action, the District Court correctly held – and the Second Circuit properly affirmed – that Petitioner was unable to establish that the actions about which he complains occurred under circumstances giving rise to an inference of discrimination.

With regard to the assignment of overtime, Petitioner "does not contend that he never received overtime assignments. Rather he asserts that the overtime opportunities were offered to his Caucasian and Hispanic colleagues in

---

(Cont'd)
an adverse employment action, the cases Petitioner cites in his petition – which mirror those cited in his summary judgment opposition and his appeal brief and stand only for the black letter law principle that adverse employment actions *may* include "less flagrant reprisals" than termination or a reduction in wages and benefits – are irrelevant. (*See* Petition for Writ of Certiorari at 9-10).

disregard of the seniority-based overtime list. It is this procedure that [Petitioner] alleges is discriminatory irrespective of the actual overtime hours he worked." (Pet. App. B at 18a). Even if, however, Petitioner were correct that Respondent departed from the overtime provision in the CBA when it assigned overtime – a charge refuted by the undisputed evidence – that fact is irrelevant because, as the District Court held, and the Court of Appeals confirmed, Petitioner's "own declination of overtime opportunities belies his claim of race discrimination." (Pet. App. B at 17a & n. 4; Pet. App. A at 3a).

### C. Summary Judgment Was Appropriate As The Lower Courts Recognized That Petitioner Advanced No Proof Of Intentional Discrimination

Petitioner does not dispute that he bears the ultimate burden of proving intentional discrimination under Title VII. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000). Thus, even if he had been able to adduce evidence of a *prima facie* case of race discrimination, such proof "gives rise to only a rebuttable presumption of discriminatory intent." *Williams v. First Fed. Sav. & Loan*, 554 F. Supp. 447, 449 (N.D.N.Y. 1981), *aff'd*, 697 F.2d 310 (2d Cir. 1982).

The District Court correctly determined, as recognized on appeal, that Petitioner had no evidence to establish that Respondent's legitimate, nondiscriminatory reason for the overtime assignments at issue – efficiency concerns and managerial needs, the requirement that the custodial foreman oversee certain overtime jobs regardless of whether he is on the seniority-based overtime lists, and the existence of

overtime assignments which require specialized skills – was pretextual. (Pet. App. B at 19a-21a; Pet. App. A at 3a).

Further, the evidence in the record – including Petitioner's own admissions that he was offered, but declined, additional overtime opportunities – establishes that Respondent *did not* assign overtime in a racially discriminatory manner. As the District Court correctly held and the Court of Appeals properly affirmed:

> [T]here is no basis to conclude that [Respondent's] reasons for making off-list overtime assignments is a pretext for unlawful discrimination. [Respondent] has presented nondiscriminatory reasons for its assignment of overtime, and [Petitioner] has not presented evidence such that a jury could find that he has rebutted this proffer or established the necessary discriminatory intent by a preponderance of the evidence. Whether or not the assignment of overtime was done fairly or even consistently with the collective bargaining agreement is not relevant, absent some indication that [Petitioner's] race had anything to do with such assignments. Nothing in the record indicates discriminatory animus and [Petitioner's] evidence has not placed any of the material issues, those concerning [Respondent's] proffered nondiscriminatory reasons for the assignment of overtime, into genuine dispute. (Pet. App. B at 21a.)

## CONCLUSION

Because summary judgment dismissing Petitioner's Title VII claim was appropriately entered by the District Court and correctly affirmed by the Court of Appeals and such dismissal does not raise any issues worthy of consideration by this Court, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

AIMEE B. FLORIN
*Counsel of Record*
JILL L. ROSENBERG
ORRICK, HERRINGTON
& SUTCLIFFE LLP
666 Fifth Avenue
New York, New York 10103
(212) 506-5000

*Counsel for Respondent*